

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TRUSTEES OF THE CONSTRUCTION
INDUSTRY AND LABORERS HEALTH
AND WELFARE TRUST, et al.,

Plaintiffs,

v.

INTERSTATE HOTEL INSTALLATION,

Defendant.

Case No. 2:12-cv-00353-MMD-GWF

ORDER

(Def.'s Motion for Summary Judgment –
dkt. no. 13;
Plf.'s CounterMotion for Summary
Judgment – dkt. no. 15;
Plf.'s Motion to Withdraw CounterMotion –
dkt. no. 27;
Plf.'s Motion for Leave to File Sur-Reply
and for Oral Argument – dkt. no. 28)

I. SUMMARY

Before the Court are various motions brought by the parties in this Employee Retirement Income Security Act ("ERISA") action. Defendant Interstate Hotel Installation ("Interstate") brings this Motion for Summary Judgment, which Plaintiffs opposed. (See dkt. no. 13.) Plaintiffs subsequently filed a Motion for Leave to File Sur-Reply and for Oral Argument. (Dkt. no. 28.)

Plaintiffs also filed a CounterMotion for Summary Judgment (dkt. no. 15), which they subsequently sought to withdraw through a Motion to Withdraw CounterMotion (dkt. no. 27.)

II. BACKGROUND

Plaintiffs are Trustees of the Construction Industry and Laborers Health and Welfare Trust, Trustees of the Construction Industry and Laborers Joint Pension Trust, Trustees of the Construction Industry and Laborers Vacation Trust, and Trustees of the

1 Southern Nevada Laborers Local 872 Training Trust (collectively “Trust Funds” or
2 “Plaintiffs”). Interstate, a Nevada corporation, employed persons who performed work
3 covered by a collective bargaining agreement between Interstate and the Laborers
4 International Union of North America, Local 872 (“the Local”). The Trust Funds are
5 ERISA employee benefit trust funds that provide pension, health and welfare, vacation,
6 and training benefits to employees covered by the collective bargaining agreement
7 between Interstate and the Local.

8 Plaintiffs filed their Complaint in this case on March 5, 2012, seeking delinquent
9 contributions they allege an entitlement to through various collective bargaining
10 agreements, trust agreements that established the Trust Funds, and provisions of
11 ERISA-mandated reports and contributions. (See *dk.* no. 1 at ¶¶ 4-9.) They seek
12 contributions for the period between July 1, 2003, and March 31, 2009. This is the third
13 such action brought by the Trust Funds. They had first filed suit on December 31, 2007,
14 for an audit and contributions covering the period from January 1, 2001, to May 28,
15 2008. (See *dk.* no. 13-1.) That suit was voluntarily dismissed per a settlement
16 agreement entered into on May 27, 2008. (*Dkt.* no. 13-3.) The Trust Funds brought a
17 second suit on December 11, 2009, for an audit and contributions for July 1, 2003, and
18 March 31, 2009. (See *dk.* no. 13-4.) The second suit was also voluntarily dismissed on
19 September 16, 2010, pursuant to a settlement agreement. (*Dkt.* no. 13-6.)

20 After filing an Amended Answer to the Complaint (*dk.* no. 8), Interstate filed this
21 Motion for Summary Judgment on April 13, 2012 (*dk.* no. 13). Five days later, the Trust
22 Funds filed their CounterMotion for Summary Judgment (*dk.* no. 15), but later filed a
23 Motion to Withdraw the CounterMotion (*dk.* no. 27). Good cause appearing, the Court
24 grants the Trust Funds’ Motion to Withdraw, and addresses the remaining two Motions
25 below.

26 **III. LEGAL STANDARD**

27 The purpose of summary judgment is to avoid unnecessary trials when there is no
28 dispute as to the facts before the court. *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18

1 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the pleadings,
2 the discovery and disclosure materials on file, and any affidavits “show there is no
3 genuine issue as to any material fact and that the movant is entitled to judgment as a
4 matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is “genuine”
5 if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for
6 the nonmoving party and a dispute is “material” if it could affect the outcome of the suit
7 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).
8 Where reasonable minds could differ on the material facts at issue, however, summary
9 judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
10 1995). “The amount of evidence necessary to raise a genuine issue of material fact is
11 enough ‘to require a jury or judge to resolve the parties’ differing versions of the truth at
12 trial.’” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (*quoting First Nat’l*
13 *Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). In evaluating a summary
14 judgment motion, a court views all facts and draws all inferences in the light most
15 favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793
16 F.2d 1100, 1103 (9th Cir. 1986).

17 The moving party bears the burden of showing that there are no genuine issues
18 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In
19 order to carry its burden of production, the moving party must either produce evidence
20 negating an essential element of the nonmoving party’s claim or defense or show that
21 the nonmoving party does not have enough evidence of an essential element to carry its
22 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
23 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s
24 requirements, the burden shifts to the party resisting the motion to “set forth specific
25 facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The
26 nonmoving party “may not rely on denials in the pleadings but must produce specific
27 evidence, through affidavits or admissible discovery material, to show that the dispute
28 exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do

1 more than simply show that there is some metaphysical doubt as to the material facts.”
2 *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). “The
3 mere existence of a scintilla of evidence in support of the plaintiff’s position will be
4 insufficient.” *Anderson*, 477 U.S. at 252.

5 **IV. DISCUSSION**

6 Interstate brings its Motion for Summary Judgment arguing that the Trust Funds’
7 claims are barred pursuant to the two dismissal rule, and that the plain language of Fed.
8 R. Civ. P. 41(a)(1) bars this suit based on the prior dismissals. (See dkt. no. 13 at 8-9.)
9 Interstate also argues that the Trust Funds’ claims for contribution prior to March 5,
10 2006, are time-barred. (*Id.* at 9-10.) In the alternative, Interstate requests partial
11 summary judgment on the Trust Funds’ contribution claims for one employee that was
12 subject to a prior settlement. (*Id.* at 10.)

13 **A. Two Dismissal Rule**

14 Fed. R. Civ. P. 41(a)(1) governs voluntary dismissal of actions by a plaintiff, and
15 provides that a plaintiff may voluntarily dismiss an action, without a court order, by filing
16 a notice of dismissal or, where the defendant has answered or filed a motion for
17 summary judgment, a stipulation of dismissal signed by all the parties that have
18 appeared in the action. It further provides that “if the plaintiff previously dismissed any
19 federal- or state-court action based on or including the same claim, a notice of dismissal
20 operates as an adjudication on the merits.” Fed. R. Civ. P. 41(a)(1)(B). “[A] voluntary
21 dismissal is presumed to be ‘without prejudice’ unless it states otherwise, but a voluntary
22 dismissal of a second action operates as a dismissal on the merits if the plaintiff has
23 previously dismissed an action involving the same claims.” *Commercial Space Mgmt.*
24 *Co., Inc. v. Boeing Co., Inc.*, 193 F.3d 1074, 1076 (9th Cir. 1999). This rule is known as
25 the “two dismissal rule.” *Id.*

26 However, “[a] trust fund that wishes to preclude the application of res judicata to a
27 future action based on a claim that the employers’ payments have been inaccurate, can
28 reserve that right in any agreement that results in the dismissal with prejudice of an

1 action for delinquent payments.” *Int’l Union of Operating Engineers-Employers Const.*
 2 *Indus. Pension, Welfare & Training Trust Funds v. Karr*, 994 F.2d 1426, 1432 (9th Cir.
 3 1993). “*Karr* does not prohibit parties to a lawsuit for delinquent contributions from
 4 *agreeing* to reserve plaintiffs’ right to conduct an audit and seek additional amounts
 5 owing at some later time.” *Bd. of Trustees of Auto. Indus. Welfare Fund v. Crown*
 6 *Chevrolet*, No. C 09-0466, 2009 WL 4572738, at *5 (N.D. Cal. Dec. 1, 2009).

7 In their first stipulated dismissal, the parties expressly agreed that Interstate would
 8 “waive any and all time related defenses including, but not limited to, statute of
 9 limitations . . .” for the period of time from the date of the Complaint to 60 days after
 10 compliance with the audit agreed to in the stipulation. (Dkt. no. 15-3 at ¶ 2.) After filing
 11 of the second suit, the parties entered into a settlement agreement which specifically
 12 reserved the right to pursue further claims for potential contribution deficiencies
 13 discovered after the completion of the audit. (Dkt. no. 15-5 at ¶ 6.) Applying the two-
 14 dismissal rule in this circumstance would flout the parties’ settlement agreement, run
 15 counter to the spirit of *Karr*, and would serve an injustice to the Trust Funds’ expectation
 16 that Interstate would comply with the terms of the contract it entered into. The parties’
 17 agreement ought not to be disturbed, particularly where that agreement was signed by
 18 the Court. (See dkt. no. 15-6.)

19 **B. Statute of Limitations**

20 Interstate also argues that the six-year statute of limitations applicable to the Trust
 21 Funds’ claim preclude them from seeking contributions for the period prior to March 5,
 22 2006 (six years before this suit was filed). See *Wetzel v. Lou Ehlers Cadillac Group*
 23 *Long Term Disability Ins. Program*, 222 F.3d 643, 648 (9th Cir. 2000) (holding that
 24 applicable statute of limitations for an ERISA action is that which governs suits on written
 25 contracts); NRS § 11.190(1)(b) (providing a six-year limitation period for actions on a
 26 written contract). Since contracts between parties limiting the right to plead the statute of
 27 limitations are enforceable, Interstate’s argument fails for the reasons set forth below.
 28 See *Abramson v. Brownstein*, 897 F.2d 389, 393 (9th Cir. 1990) (noting that under

1 California law, parties to a contract may waive the running of the statute by express
2 agreement); *Matter of VMS Ltd. P'ship Sec. Litig.*, 26 F.3d 50, 51 (7th Cir. 1994) (noting
3 that "a promise not to plead the statute of limitations, made during the course of
4 settlement negotiations, is enforceable").

5 Interstate waived any statute of limitations defense when it entered into the first
6 settlement agreement. In their May 27, 2008, agreement, the parties agreed that
7 Interstate would "waive any and all time related defenses, including but not limited to,
8 statute of limitations . . . on the passage of time from December 31, 2007 . . . to a date
9 sixty (60) days after the contract compliance audit in this matter has been completed."
10 (See *dk.* no. 13-3 at ¶ 2.) The Trust Funds request contributions for the period dating
11 back to July 1, 2003. The Trust Funds filed their second suit on December 11, 2009,
12 and Interstate concedes that the original settlement agreement applied up until this
13 point. Therefore, the operative period to calculate the statute of limitations at that time
14 was from July 1, 2003, to December 31, 2007 (a total of 1654 days, or 4 years and 6
15 months).

16 The court-approved second stipulated agreement was entered into on September
17 16, 2010. Even if the Court were to not toll the statute of limitations for the period
18 between the second stipulated dismissal on September 16, 2010, to March 5, 2012, the
19 date of the filing of this claim (a total of 537 days, or 1 year, 5 months and 19 days), the
20 oldest claim still falls just shy of the six-year statute of limitations.

21 Interstate seeks to alter the goal posts by arguing that the Court ought to calculate
22 the statute of limitations not from the date of the second stipulated dismissal, but from
23 some date between the filing of the second lawsuit and the September 16, 2010, date of
24 the second stipulated dismissal, since the audit over the disputed contributions was
25 completed before September 16, 2010. However, it presents no evidence to allow the
26 Court to determine when the audit was completed, and instead points to a clause of the
27 second settlement agreement that states that an audit for the period through June 30,
28 2003, was completed. (See *dk.* no. 13-5 at 1.) But this dispute concerns contributions

1 for the period *after* June 30, 2003. Indeed, the second paragraph of the second
2 settlement agreement makes expressly clear that an audit for the period beginning July
3 1, 2003, has *not* been completed, since Interstate is compelled to provide “for inspection
4 and audit its payroll and reasonably related records . . . from July 1, 2003 through June
5 30, 2008.” (*Id.* at ¶ 2.) As a result, at the time the second settlement agreement was
6 signed on September 16, 2010, no audit for the disputed period appears to have
7 occurred, and therefore the first settlement agreement’s waiver of the statute of
8 limitations defense extended until September 16, 2010.

9 Interstate also seeks to characterize the second settlement agreement as a
10 novation that superseded the waiver of the statute of limitations defense in the first
11 agreement. The Court seriously doubts that the second settlement agreement applies to
12 vacate the first agreement’s waiver to resurrect from the grave Interstate’s statute of
13 limitations defense. But even if it did, equitably tolling the statute of limitations would be
14 appropriate in this circumstance. See *Copeland v. Desert Inn Hotel*, 673 P.2d 490, 492
15 (Nev. 1983) (listing factors to consider when determining whether to apply doctrine of
16 equitable tolling). Accordingly, the statute of limitations defense is unavailable to
17 Interstate.

18 **C. Partial Summary Judgment for Claims Relating to Anthony Davis**

19 In the alternative, Interstate seeks partial summary judgment on the Trust Funds’
20 claims for delinquent contributions relating to work performed by employee Anthony
21 Davis. On January 8, 2008, Davis, through a representative from the Local, submitted a
22 grievance to Interstate seeking back wages and benefits for hours worked from April
23 2007 through January 2, 2008. (See *dk.* no. 13-2A.) On May 13, 2008, Interstate and
24 Davis’ representative entered into a settlement agreement where Interstate was to pay
25 the Local a total of \$11,465.44. (*Dkt.* no. 13-2B.) The check ultimately issued by
26 Interstate stated that it was paid for a settlement “to include wage and benefits.” (*Dkt.*
27 no. 13-2C.)

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1 The Court agrees with Interstate. The documents provided in support of
2 Interstate's Motion indicate that the Local settled its claims over both back wages and
3 benefits with Interstate, at least for the period between April 2007 through January 2,
4 2008. The Trust Funds argue that because they were not parties to the binding
5 agreement between Interstate and the Local, the Davis settlement has no bearing on
6 this action. However, as Interstate correctly points out, "[a] third party beneficiary who
7 seeks to enforce a contract does so subject to the defenses that would be valid as
8 between the parties." *Morelli v. Morelli*, 720 P.2d 704, 706 (Nev. 1986). Here, the Trust
9 Funds are third party beneficiaries of the collective bargaining agreement signed
10 between the Local and Interstate. See, e.g., *Pierce Cnty. Hotel Emps. & Rest. Emps.*
11 *Health Trust v. Elks Lodge*, 827 F.2d 1324, 1326 (9th Cir. 1987) (noting that benefits
12 trust funds are third party beneficiaries of collective bargaining agreements between the
13 employer and the union). Here, the Trust Funds are third party beneficiaries of the
14 collective bargaining agreement, and cannot sue to recover delinquent contributions for
15 payments received by the Local that included benefit contributions. It is irrelevant that
16 Interstate agreed in the second settlement agreement to make Davis' employment
17 records available for an audit. (See dkt. no. 13-5 at ¶ 2.) The Trust Funds thus fail to
18 raise any triable issue of material fact as to delinquent contributions made for Davis'
19 employment between April 2007 and January 2, 2008.

20 **V. CONCLUSION**

21 In sum, Interstate's Motion for Summary Judgment on the Trust Funds' claims
22 fails. However, the Court grants its request for partial summary judgment as to Anthony
23 Davis' claims with respect to the period outlined above. As the Court's adjudication of
24 Interstate's Motion did not require additional briefing or an oral hearing, the Trust Funds'
25 Motion for Leave to File Sur-Reply and for Oral Argument is denied.


26 Accordingly, IT IS HEREBY ORDERED that Defendant Interstate's Motion for
27 Summary Judgment (dkt. no. 13) is DENIED in part and GRANTED in part.

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1 IT IS FURTHER ORDERED that Plaintiff Trust Funds' Motion to Withdraw
2 CounterMotion for Summary Judgment (dkt. no. 27) is GRANTED. The Trust Funds'
3 CounterMotion (dkt. no. 15) is hereby WITHDRAWN.

4 IT IS FURTHER ORDERED that the Trust Funds' Motion for Leave to File Sur-
5 Reply and for Oral Argument (dkt. no. 28) is DENIED.

6 DATED THIS 5th day of March 2013.

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10 MIRANDA M. DU
11 UNITED STATES DISTRICT JUDGE
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